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No. ~~15,369~~

IN THE

United States Court of Appeals

For the Ninth Circuit

RICHARD G. RISER,
Appellant,

vs.

HARLEY O. TEETS, Warden of the California State Prison at San Quentin,
Appellee.

On Appeal from the United States District Court for the Northern District of California, Southern Division.

Honorable Edward P. Murphy, District Judge.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

STATEMENT OF THE CASE.

On April 15, 1957, appellant filed a petition for writ of habeas corpus in the United States District Court (see CT 52). An order to show cause was issued on April 15, 1957 (CT 53).

On April 17, 1957, the District Court issued an order staying execution (CT 63-65), and on the following day, April 18, 1957, amended the order staying execution (CT 64).

On May 7, 1957, the District Court discharged the order to show cause and denied the petition for writ of habeas corpus (CT 86).

On June 20, 1957, the U. S. District Court issued a stay of execution until the final disposition of the appeal in this matter (CT 89). On June 24, 1957, the District Court granted a certificate of probable cause for appeal from its order denying the petition for writ of habeas corpus, and likewise issued an order granting permission to pursue the appeal in *forma pauperis* (CT 91-92).

On June 25, 1957, the notice of appeal was filed with the Clerk (CT 93).

Sufficiency of Notice of Appeal.

It will be noted from the statement of the case, that the order denying the petition for writ of habeas corpus and discharging the order to show cause was filed on May 7, 1957, and that the transcript on appeal reflects that the notice of appeal was filed on June 25, 1957. Thus, on the face of the record, it appears that the notice of appeal was filed beyond the 30 days provided for the filing of a notice of appeal under the Federal Rules of Civil Procedure (Rule 72).

However, it should be noted that inquiry into this matter has been made by the appellee and appellee is satisfied from his own files and from discussion of the matter with appellant's counsel, that the notice of appeal was placed in the hands of the Clerk prior to the expiration of the 30 days. Appellee assumes

appellant will clarify this matter further by affidavit or otherwise, to the satisfaction of the Court. Thus appellee will not pursue the contention that the notice of appeal was not timely.

STATEMENT OF FACTS.

Appellant was convicted in the Superior Court of the State of California, in and for the County of Stanislaus, on two counts of murder. The jury returned verdicts of guilty of murder in the first degree. Thereupon judgments and sentences of death were entered by the Court.

The automatic appeal was taken to the California Supreme Court. In that appeal appellant contended that his pre-trial motions to be furnished with a copy of the fingerprint taken from a bottle and for permission to inspect statements made by two witnesses were erroneously denied. Petitioner also contended that the Court erred in granting a motion to vacate a *subpoena duces tecum* which sought statements given by the witness Burgess. This subpoena was sought after the witness, Burgess, had testified for the prosecution and was based on affidavits that the statements were material and were contradictory to the witness' testimony at the trial.

The California Supreme Court affirmed the judgment and held that the error of the Court in granting the motion to vacate the subpoena was error, but not prejudicial. See *People v. Riser,* 47 Cal. 2d 566.

SUMMARY OF APPELLANT'S CONTENTIONS.

1. Appellant was denied due process of law when the Superior Court denied his motions for the production of statements of witnesses and copies of fingerprints prior to trial.

2. When the Superior Court denied the appellant the right to examine written statements made by a witness for the prosecution, after the witness was called and testified for the prosecution, the Superior Court violated appellant's right of cross-examination, the production of evidence and the essentials of a fair trial, in violation of due process of law.

3. Appellant was denied equal protection of the law by the California Supreme Court as a result of its unequal application of the reversible error rule as applied to the admitted error of the trial Court by its failure to require the prosecution to produce the written statements of the witness after the witness had testified.

SUMMARY OF APPELLEE'S ARGUMENT.

I. Pre-trial access to confidential police records is not a common law right; the denial of such access prior to and during the trial is not a violation of due process of law.

II. A denial of equal protection of the law by an Appellate Court is not sufficiently alleged by the mere allegation that the Appellate Court applied the prejudicial error rule "unequally"; the California Supreme Court applied the prejudicial error rule

correctly and without discrimination in the case of *People v. Riser.*

ARGUMENT.

I.

PRE-TRIAL ACCESS TO CONFIDENTIAL POLICE RECORDS IS NOT A COMMON LAW RIGHT; THE DENIAL OF SUCH ACCESS PRIOR TO AND DURING THE TRIAL IS NOT A VIOLATION OF DUE PROCESS OF LAW.

The appellant contends that he was denied due process of law by the California trial Court on the ground that he was denied access to written statements and other evidence in the possession of the prosecution.

This broad contention is divided into two separate parts: first, that he was unconstitutionally denied pre-trial access to statements and records in the possession of the prosecution; and secondly, appellant claims that he was denied due process when he was denied access to statements of a witness in the possession of the prosecution, after the witness had testified for the prosecution.

Specifically, appellant contends that he was denied due process when the trial Court denied his order directing the prosecution to furnish him with a copy of the fingerprint taken at the scene of the crime, and to allow him to inspect statements made to the police by two witnesses. This contention has been dealt with at length in many current cases and statutes. The rule at common law was clearly established; an accused could not compel production of documents or other

evidence in the possession of the prosecution. See 6 Wigmore, Evidence, 3rd ed., 1940 (475-6). This rule has been followed by numerous decisions throughout the United States.

The decisions in *State v. Tune,* 98 Atl. 2d 881 (N. J. 1953), and *U. S. v. Garsson,* 291 Fed. 646, D. C. S. D. N. Y. (1923), contain excellent statements in support of the common law rule. In *State v. Tune, supra,* at 884, the Court stated as follows:

> "However, such liberal fact-finding procedures are not to be used blindly where the result would be to defeat the ends of justice. In criminal proceedings long experience has taught the courts that often discovery will lead not to honest fact-finding, but on the contrary to perjury and the suppression of evidence. Thus the criminal who is aware of the whole case against him will often procure perjured testimony in order to set up a false defense, State v. Rhoads, 81 Ohio St. 397, 423-424, 91 N. E. 186, 192, 27 L.R.A., N.S. 558 (Sup. Ct. 1910); Commonwealth v. Mead, 12 Gray 167, 170 (Mass. 1858). Another result of full discovery would be that the criminal defendant who is informed of the names of all of the State's witnesses may take steps to bribe or frighten them into giving perjured testimony or into absenting themselves so that they are unavailable to testify. Moreover, many witnesses, if they know that the defendant will have knowledge of their names prior to trial, will be reluctant to come forward with information during the investigation of the crime, People v. DiCarlo, 161 Misc. 484, 485-486, 292 N.Y.S. 252, 254 (Sup. Ct. 1936). All these dangers are more inherent in criminal

proceedings where the defendant has much more at stake, often his life, than in civil proceedings. The presence of perjury in criminal proceedings today is extensive despite the efforts of the courts to eradicate it and constitutes a very serious threat to the administration of criminal justice and thus to the welfare of the country as a whole. (citation) To permit unqualified disclosure of all statements and information in the hands of the State would go far beyond what is required in civil cases; it would defeat the very ends of justice.

"In considering the problem it must be remembered that in view of the defendant's constitutional and statutory protections against self-incrimination, the State has no right whatsoever to demand an inspection of any of his documents or to take his deposition or to submit interrogatories to him.

" . . .

" . . . the State is completely at the mercy of the defendant who can produce surprise evidence at the trial, can take the stand or not as he wishes, and generally can introduce any sort of unforeseeable evidence he desires in his own defense. To allow him to discover the prosecutor's whole case against him would be to make the prosecutor's task almost insurmountable."

Likewise Judge Learned Hand, in *U. S. v. Garsson, supra,* stated as follows:

" . . . Under our criminal procedure the accused has every advantage. While the prosecution is held rigidly to the charge, he need not disclose the

> barest outline of his defense. He is immune from question . . . ; he cannot be convicted when there is the least fair doubt in the minds of anyone of the twelve. Why in addition he should in advance have the whole evidence to pick over at his leisure, and make his defense, fairly or foully, I have never been able to see. No doubt grand juries err and indictments are calamities to honest men, but we must work with human beings and we can correct such errors only at too large a price. Our dangers do not lie in too little tenderness to the accused. Our procedure has always been haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays and defeats the prosecution of crime."

Furthermore, Congress has recently reaffirmed the common law rule as applied to federal courts. Public Law 269, 85th Congress 71 Stat. 594, added section 3500 to Title 18 of the U. S. Code. This section provides in part as follows:

> "(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case."

Certainly, if due process is measured in terms of the Anglo-American concepts of fairness, by historical

practice, and the collected wisdom of common law jurisdictions, then denial of pre-trial discovery in a criminal case is not a violation of due process. Such was the rule at common law, such is currently the rule in the overwhelming majority of states, and such is the rule currently reaffirmed by Congress. Thus, certainly the denial of pre-trial discovery to the defendant was not a violation of due process of law.

Appellant likewise contends that the trial Court's granting of the motion to vacate the subpena which sought to bring into Court the statement given by the witness Burgess to the police, was a violation of due process. These statements were sought for the purpose of impeaching the witness and were based on an affidavit that the witness had given a contradictory statement to the police. On the stand the witness Burgess denied making prior inconsistent statements. This, however, is not properly a question of the limitation of cross-examination, since the witness was cross-examined concerning said statements and denied having made them. Appellant, however, perhaps would have been able to lay a foundation to impeach the witness, and in fact impeach the witness, by the writings or by the testimony of the officers to whom the statements were given. The California Supreme Court held that the denial by the trial Court of access to these statements was error, however, not prejudicial error. See *People v. Riser,* 47 Cal. 2d 566 at 584-589.

The standard of due process of law being one of "essential fairness" is not violated by the Court's failure to order production of the statements of the

witness Burgess. Indeed, apparently at common law, no such right existed in the defendant. Likewise, there exists authority contrary to the California rule. See *State v. Rhoads,* 91 N. E. 186 (Ohio, 1910.) Likewise, such appeared to be the rule in Federal cases in recent years. See *Little v. U. S.,* 93 Fed. 2d 401, cert. den. 303 U. S. 644.

Furthermore, those jurisdictions following the rule adopted by California in the case of *People v. Riser,* do not treat the rule as one of due process, but rather of prejudicial error. Indeed, the United States Supreme Court in the adoption of the rule requiring the production of statements of a witness for the prosecution after the witness has testified for the prosecution, has treated it as a rule of prejudicial error. In the case of *Gordon v. U. S.,* 344 U. S. 414, the Court dealt at length with the problem of the prejudicial nature of the ruling. Indeed, in the *Gordon* case, *supra,* the Court stressed the fact that additional error existed other than the failure of the Court to require the Government to produce the statements of the witness for the purposes of possible impeachment after the witness had testified. The Court in this case stated, in 344 U. S. 414 at 422, as follows:

> "We believe, moreover, that the combination of these two errors was sufficiently prejudicial to require reversal. . . . Reversals should not be based on trivial, theoretical and harmless rulings. But we cannot say that these errors were unlikely to have influenced the jury's verdict. We believe they prejudiced substantial rights and the judgment must be *Reversed.*"

Furthermore, the decision in *Jencks v. U. S.,* 77 S. Ct. 1007, does not purport to adopt a rule of due process. At no point in that case is the problem discussed as one of due process of law. Indeed, the language indicates that it is purely a rule applicable to Federal Courts. The Court in the *Jencks* decision, *supra,* at 1013, clearly indicates that this is a rule for the administration of criminal justice in Federal Courts. Furthermore, the rule of the *Jencks* case to the extent that it requires the Government to release all statements of a witness for the Government after the witness has testified, has been modified by Congress. See Public Law 269, 85th Congress, First Session, 71 Stat. 595. Thus, the rule adopted by California in the case of *People v. Riser,* which requires the prosecution to produce statements after a witness has testified for the prosecution, is not a requirement of due process of law. Any incorrect application of this rule is mere error, and the State Court could, and should, determine whether or not said error was prejudicial.

II.

A DENIAL OF EQUAL PROTECTION OF THE LAW BY AN APPELLATE COURT IS NOT SUFFICIENTLY ALLEGED BY THE MERE ALLEGATION THAT THE APPELLATE COURT APPLIED THE PREJUDICIAL ERROR RULE "UNEQUALLY"; THE CALIFORNIA SUPREME COURT APPLIED THE PREJUDICIAL ERROR RULE CORRECTLY AND WITHOUT DISCRIMINATION IN THE CASE OF PEOPLE v. RISER.

The appellant contends that he was denied equal protection of the law in violation of the 14th Amend-

ment, because the California Supreme Court did not apply the rule of prejudicial error equally. Appellant contends that the California Supreme Court affirmed the judgment in his case, after admitting that the failure to require the prosecution to produce the statements of the witness Burgess after the witness had testified for the prosecution, was error, whereas in the case of *People v. Carter,* 48 A. C. 754 the California Supreme Court determined a similar error was prejudicial error.

There are three answers to this contention. First, this matter was not raised in the State Court, therefore the State remedies have not been exhausted. Secondly, the allegation does not state a Federal question. Thirdly, the California Supreme Court did not discriminate in the application of the prejudicial error rule as between the *Carter* case and the *Riser* case, or between the *Riser* case and any other case.

The novel contention advanced by the appellant that he was denied equal protection of law by the unequal application of the prejudicial error rule is not properly before this Court, since said contention has not been made in the California Supreme Court. This contention was not made on petition for rehearing or in any subsequent petition for writ of habeas corpus filed in that Court. Thus appellant has not exhausted his State remedies within the meaning of the provisions of 28 U. S. C. 2254.

Appellant has not stated a sufficient Federal question in his allegation concerning the denial of equal

protection of the law. No substantial Federal question is presented by the mere allegation that a State Appellate Court has applied the prejudicial error rule unequally. The application of such rule is of necessity a matter peculiar to each case and dependent upon the facts of each case. In the *absence of fraud and collusion* on the part of the Appellate Court in the application of the prejudicial error rule, no denial of equal protection has been alleged. Furthermore, Appellate Courts frequently determine that a matter is prejudicial error after numerous prior rulings that the matter was non-prejudicial error. Such a situation only indicates that the law of the State involved has been changed.

Furthermore, there was no showing in the Court below, and there is no showing here, that the California Supreme Court has applied the prejudicial error rule unequally. Appellant specifically points to the case of *People v. Carter,* 48 A. C. 754 to establish the denial of equal protection of the prejudicial error rule. The simple answer to this proposition is that in the case of *People v. Carter, supra,* the Court pointed to several errors in addition to the error of the Court in refusing to permit the defendant to inspect statements given the prosecution by a witness for the prosecution. The Court pointed to errors in instructions, as well as errors in the introduction and exclusion of evidence, the cumulative effect of which was a "miscarriage of justice" within the meaning of Article IV, Section 4½ of the California Constitution.

CONCLUSION.

It is respectfully submitted that the decisions in this matter be affirmed.

Dated, San Francisco, California.
November 12, 1957.

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